PRATAPBHAI HAMIRBHAI SOLANKI

v.

STATE OF GUJARAT AND ANOTHER

SUPREME COURT, INDIA
(2013) 1 SUPREME COURT CASES 613
KSP RADHAKRISHNAN J
DIPAK MISRA J
[CRIMINAL APPEAL NO: 1649 OF 2012†]
12 OCTOBER 2012

[CRIMINAL PROCEDURE] *Criminal Procedure Code, 1973 - Sections 439, 482 and 173 - Grant of bail - Relevant considerations - Where fresh investigation ordered by High Court in view of perfunctory nature of investigation conducted by investigating authority, it would be inappropriate to enlarge accused on bail*

[CRIMINAL LAW] *Penal Code, 1860 - Sections 120-A & 120-B r/w Section 302 - Criminal conspiracy - Ingredients and proof - Principles reiterated*

An FIR was lodged against two persons alleging that they had fired at the deceased, an RTI activist, from their revolver which resulted in his death. The occurrence allegedly took place at about 8.30 p.m. on a public road near the State Bar Council office. A police constable informed his superior inspector on his mobile phone about the incident. In the course of investigation, the appellant was arrested along with others for criminal conspiracy to commit murder. The investigating agency placed the charge-sheet before the competent court. The material on record showed that the appellant, a dealer in mobile phones, had handed over the mobile phones to his friend who was a police constable and that a call had been traced from the mobile of the contract killer to the appellant. During the pendency of investigation, an application was filed before the Sessions Judge for grant of bail but the same was rejected. Thereafter, the appellant preferred a bail application under Section 439 CrPC before the High Court urging that the appellant for no justifiable reasons, had remained in custody for

† Arising out of SLP (Crl.) No. 2450 of 2012. From the Judgment and Order dated 26-7-2011 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 9576 of 2011

long and the charge-sheet had been filed under Sections 302, 201 and 120-B IPC solely on the basis of statement of a peon serving in the office of the appellant and that there was no material to rope him in the crime. The application for bail was resisted by the prosecution on the ground that the deceased had found the appellant to be involved in a number of illegal activities and the deceased had exposed the appellant in a number of ways as a consequence of which he had hatched the conspiracy with Accused 1 which ultimately resulted in hiring of Accused 2 as a contract killer to eliminate the deceased. The Single Judge of the High Court held that the conspiracy between Accused 4, the appellant and Accused 1 was obvious from the number of visits of Accused 1 to the office of Accused 4; that there was conversation between Accused 4, and the sharpshooter, a person who had absconded and that itself *prima facie* showed the involvement of the appellant-accused. The High Court taking note of all the aspects including the gravity of the offence declined to grant bail to the appellant. A Division Bench of the High Court in *Bhikhalal Jethava v. State of Gujarat* by its order dated 25-9-2012 expressed its dissatisfaction with regard to the investigation which it called as perfunctory. After ascertaining reasons it directed CBI to expeditiously undertake a comprehensive investigation.

Dismissing the appeal and denying bail, the Supreme Court Held:

It is true that liberty is a greatly cherished value in the life of an individual, and no one would like to barter it for all the tea in China, but it is obligatory on the part of the court to scan and scrutinise, though briefly, as regards the *prima facie* case, the seriousness and gravity of the crime and the potentiality of the accused to tamper with the evidence apart from other aspects before the restriction on liberty is lifted on imposition of certain conditions. (para 19)

State v. Capt. Jagjit Singh, AIR 1962 SC 253 : (1962) 1 Cri LJ 215 : (1962) 3 SCR 622

Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41

Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13 : 2005 SCC (Cri) 481

Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280 : 2001 SCC (Cri) 674

State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)
Ash Mohammad v. Shiv Raj Singh, (2012) 9 SCC 446 : (2012) 3 SCC (Cri) 1172, relied on

The ingredients of the offence of conspiracy are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. (para 23)

Damodar v. State of Rajasthan, (2004) 12 SCC 336 : 2004 SCC (Cri) Supp 265;
Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609 : 1988 SCC (Cri) 711;
State of Maharashtra v. Som Nath Thapa, (1996) 4 SCC 659 : 1996 SCC (Cri) 820;
Ram Narayan Popli v. CBI, (2003) 3 SCC 641 : 2003 SCC (Cri) 869, followed

Ordinarily, the Supreme Court would have proceeded to express its opinion on the basis of analysis of the material available on record. But the High Court in its order dated 25-9-2012 has directed CBI to conduct a comprehensive inquiry. It is open to the appellant to challenge the legal substantiality of the said order. But for the present, as there is a direction for fresh investigation, the appellant cannot be granted bail. In case the order for reinvestigation is annulled by the Supreme Court, it would be open for the appellant to file a fresh application for bail before the competent court. If the order of the High Court withstands scrutiny, after CBI submits its report, liberty is granted to the appellant to move the appropriate court for grant of bail. No opinion is expressed by the Supreme Court on the entitlement of the appellant to be released on bail or not because of the subsequent development i.e. direction by the High Court for comprehensive investigation by CBI. (para 26)

Pratapbhai Hamirbhai Solanki v. State of Gujarat, Criminal Misc. Application No. 9576 of 2011, order dated 26-7-2011 (Guj);
Pratapbhai Hamirbhai Solanki v. State of Gujarat, Criminal Misc. Application No. 2847 of 2011, order dated 30-3-2011 (Guj)
Pratapbhai Hamirbhai Solanki v. State of Gujarat, Criminal Misc. Application No. 7505 of 2011, order dated 6-6-2011 (Guj)
Bhikhalal Kalyanji Jethava v. State of Gujarat, Special Criminal Application No. 1925 of 2010, order dated 25-9-2012 (Guj), referred to

R-D/50885/CR

Advocates who appeared in this case:

For the appearing parties - Mukul Rohatgi and V.K. Bali, Senior Advocates (Sujay N. Kantawala, Saurabh Kirpal, Sanjay Agarwal, Karan Bharioke, Alpesh Kogje, Dr G.K. Sarkar, Ms Malabika Sarkar, Rakesh Dahiya, Ms Hemantika Wahi, Ms Jesal, Ms Nandani Gupta, Ms Kamini Jaiswal, Mohit D. Ram and Ms Meenakshi Arora, Advocates)

Chronological list of cases cited on page(s):

Ash Mohammad v. Shiv Raj Singh (2012) 9 SCC 446 : (2012) 3 SCC (Cri) 1172
Bhikhalal Kalyanji Jethava v. State of Gujarat Special Criminal Application No. 1925 of 2010, order dated 25-9-2012 (Guj)
Pratapbhai Hamirbhai Solanki v. State of Gujarat Criminal Misc. Application No. 9576 of 2011, order dated 26-7-2011 (Guj)
Pratapbhai Hamirbhai Solanki v. State of Gujarat Criminal Misc. Application No. 7505 of 2011, order dated 6-6-2011 (Guj)
Pratapbhai Hamirbhai Solanki v. State of Gujarat Criminal Misc. Application No. 2847 of 2011, order dated 30-3-2011 (Guj)
State of U.P. v. Amarmani Tripathi (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)
Jayendra Saraswathi Swamigal v. State of T.N. (2005) 2 SCC 13 : 2005 SCC (Cri) 481
Damodar v. State of Rajasthan (2004) 12 SCC 336 : 2004 SCC (Cri) Supp 265
Ram Narayan Popli v. CBI (2003) 3 SCC 641 : 2003 SCC (Cri) 869
Prahlad Singh Bhati v. NCT, Delhi (2001) 4 SCC 280 : 2001 SCC (Cri) 674
State of Maharashtra v. Som Nath Thapa (1996) 4 SCC 659 : 1996 SCC (Cri) 820
Kehar Singh v. State (Delhi Admn.) (1988) 3 SCC 609 : 1988 SCC (Cri) 711
Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118 : 1978 SCC (Cri) 41
State v. Capt. Jagjit Singh AIR 1962 SC 253 : (1962) 1 Cri LJ 215 : (1962) 3 SCR 622

JUDGMENT

Dipak Misra J:

[1] Leave granted. Aggrieved by the order of rejection of prayer for bail for the offences punishable under Sections 302, 201 and 120-B of the Penal Code, 1860 (for short "IPC") and under Sections 25(1)(b) and 27 of the Arms Act, 1959 in *Pratapbhai Hamirbhai Solanki v. State of Gujarat*[1] dated 26-7-2011 by the High Court of Gujarat at Ahmedabad, the appellant-Accused 4, has preferred the present appeal by special leave under Article 136 of the Constitution.

[2] The appellant was arraigned as an accused in Crime/FIR No. 163 of 2010 for the aforesaid offences and the investigation was conducted by CID (Crime), Ahmedabad. The prosecution case, in brief, is that an FIR was registered against two persons on 20-7-2010 at about 8.40 p.m. They came on a Bajaj motorcycle having Registration No. GJ 1 DQ 2482. At the corner of Satyamev Complex-I, Opposite Gujarat High Court at S.G. Highway, they fired at one Amitbhai Bhikhabhai Jethwa from their country-made revolver on the left part of his back and caused injuries to which he succumbed and they immediately disappeared from the scene of occurrence. After the criminal law was set in motion, the investigating agency commenced investigation and after completion, placed the charge-sheet before the competent court.

[3] During the pendency of investigation, an application was filed before the learned Sessions Judge for grant of bail contending, *inter alia*, that the name of the appellant was not found in the FIR; that he had no nexus with the commission of crime; that the case of the prosecution that he had conspired for murder of the deceased, who was an RTI activist, was absolutely incredulous inasmuch as the allegations against the appellant were totally vague and, in fact, had been deliberately made to destroy his unblemished public image, for he had been in public life for so many years; that the material brought on record in no way implicated the appellant in the crime in question and, therefore, he was entitled to bail. The learned trial Judge, analysing the material on record, declined to enlarge the appellant on bail. Be it noted, after the charge-sheet was filed the doors of the learned trial Judge were again knocked at but the same did not meet with success.

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1. Criminal Misc. Application No. 9576 of 2011, order dated 26-7-2011 (Guj)

[4] As the factual narration would exposit, the appellant-accused filed Criminal Miscellaneous Application No. 2847 on 30-3-2011 before the High Court for grant of bail, but the same was withdrawn[2]. Thereafter, the appellant filed Criminal Misc. Application No. 7505 of 2011 seeking temporary bail on the ground that his wife had suffered from acute gynaeco problem and she needed to undergo surgery for fibroid in the uterus and regard being had to the said assertion the High Court granted[3] temporary bail for a period of 21 days.

[5] As is manifest from the material brought on record, the informant, after completing his duty at about 8.00p.m., was returning to his house on a motorcycle. He went to Satyamev Complex-I with his friend, Bhupatisinh, for the purpose of having tea and then they heard a gunshot sound and they rushed to the place where the firing took place. They found that one Bajaj motorcycle No. GJ 1 DQ 2482, one country-made pistol and a plastic bag were lying on the road. They also saw a white-coloured Maruti gypsy. The informant, who was a constable, informed his superior inspector on his mobile phone and gathered information from the public around. They were informed that two persons after firing drove towards Viswas City Road. The emergency ambulance was called for and the staff after examining the injured person declared him dead. The advocate present there identified the deceased to be Amitkumar Jethwa, an RTI activist. In the course of investigation, the appellant was arrested on 7-9-2010.

[6] Thereafter, as the factual matrix is uncurtained, the appellant preferred bail application under Section 439 of the Code of Criminal Procedure, 1973 forming the subject-matter of Criminal Application No. 9576 of 2011. It was urged before the High Court that the appellant, for no justifiable reasons, had remained in custody since 7-9-2010 and the charge-sheet had been filed under Sections 302, 201 and 120-B IPC solely on the basis of the statement of Abhesinh Kesarsinh Zala, a peon serving in the office of the appellant. It was also canvassed that there was no iota of material to rope him in the crime and a maladroit effort had been made to demolish his political career and demolish his social image.

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2. *Pratapbhai Hamirbhai Solanki v. State of Gujarat*, Criminal Misc. Application No. 2847 of 2011, order dated 30-3-2011 (Guj)
3. *Pratapbhai Hamirbhai Solanki v. State of Gujarat*, Criminal Misc. Application No. 7505 of 2011, order dated 6-6-2011 (Guj)

[7] It was further urged that the first application for bail having been withdrawn, there was no bar to entertain and dispose of the second bail application on merits in favour of the appellant-accused; that the appellant is a childhood friend of the accused, Bahadursinh Vadher, a police constable, having business of mines and he is engaged in the business of mobile towers and had held the post of the ex-President of Kodinar Nagar Palika and Vice-President at the time of the incident and had been roped in such a crime solely on the base that the accused Bahadursinh had met him at his office in Kodinar where allegedly a conspiracy was hatched to eliminate the deceased, which was sans substance; that as far as the theory of conspiracy is concerned, nothing had been remotely brought on record to justify the allegations; and that the charge-sheet had been filed; and, therefore, he was entitled to be enlarged on bail. It was propounded that a singular telephonic call from the mobile the voice of which was not recorded, could not form the fulcrum of the prosecution to book the appellant in the crime and further the case has been fabricated with the sole intention to systematically smother the liberty of a law abiding individual.

[8] The application for bail was resisted by the learned counsel for the prosecution on the ground that the deceased was the President of Gir Nature Youth Club, an NGO and also Editor of a magazine *Around the Nature* and an active RTI activist. He had found the appellant to be involved in a number of illegal activities and had exposed him in a number of ways as a consequence of which he had hatched the conspiracy with Accused 1 which ultimately resulted in hiring of Accused 2 as a contract killer on payment of Rs 11 lakhs to eliminate him.

[9] The learned counsel also contended that there were various call details and contacts made by the accused, particularly, with Accused 2 who had absconded; that fake SIM cards were provided by the appellant to hide their identity; that the appellant had criminal antecedents; that no leniency should be shown despite the plea advanced as regards the social reputation; that the factum of conspiracy is quite complex and the prosecution had been able to gather the connecting materials which would go a long way to show the involvement of the appellant and hence, it was not a fit case where discretion for grant of bail should be exercised.

[10] The learned Single Judge, considering the rival submissions advanced at the Bar came to hold that the conspiracy between Accused 4 and Accused 1 was obvious from the number of visits of Accused 1 to the office of Accused 4; that there was conversation between Accused 4, the appellant herein, and the sharpshooter, a person who had absconded and that itself *prima facie* showed the involvement of the appellant-accused. The High Court taking note of all the aspects including the gravity of the offence declined to admit the appellant to bail.

[11] We have heard Mr Mukul Rohatgi, learned Senior Counsel for the appellant, Ms Hemantika Wahi, learned counsel for the State of Gujarat and Ms Kamini Jaiswal and Mr Mohit D. Ram, learned counsel for Respondent 2.

[12] Mr Rohatgi, learned Senior Counsel for the appellant-Accused 4, has submitted that the reliance on the statement of the peon who had only mentioned that Accused 1, Bahadursinh, was a frequent visitor to the office of the appellant, but he had not been able to hear any conversation because of glass doors, makes the impugned orders sensitively unsustainable as such kind of statement does not render any assistance to the prosecution case. He would further submit that the allegation that the appellant provided the finance in hiring the contract killer has no semblance of truth inasmuch as it is manifest from the statement of Amarsinh, the brother of Bahadursinh, that he had given rupees nine lakhs in cash to his brother for purchase of land in Kodinar area and thus, the appellant had no involvement with the alleged financing. It is his submission that the voice in the mobile phone was not recorded and only a singular call was made by Accused 2 and such a stray incident cannot even suggest in the remotest manner any kind of conspiracy and, therefore, regard being had to the period of incarceration, he should be enlarged on bail.

[13] Ms Hemantika Wahi, learned counsel for the State of Gujarat, resisting the application for grant of bail, submitted that the conspiracy is always hatched in secrecy and there are a series of circumstances from which the involvement of the appellant-accused is evincible and, that apart, the material on record would reveal that the appellant was in constant connection with Accused 1, who was facing a lot of disadvantage because of the proactive crusade undertaken against his illegal activities by the deceased, an RTI activist, by filing PILs. It is also urged by her that the

deceased had been able to expose the involvement of the appellant in many illegal operations and, therefore, the High Court has correctly declined to entertain the prayer for bail.

[14] Ms Kamini Jaiswal and Mr Mohit D. Ram, learned counsel for Respondent 2, the father of the deceased, have supported the stand of the State.

[15] At this juncture, we may refer with profit to certain authorities which lay down the considerations that should weigh with the Court in granting bail in non-bailable offences. This Court in *State v. Capt. Jagjit Singh*[4] and *Gurcharan Singh v. State (Delhi Admn.)*[5] has held that the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case are to be considered. The said principles have been reiterated in *Jayendra Saraswathi Swamigal v. State of T.N.*[6]

[16] In *Prahlad Singh Bhati v. NCT, Delhi*[7] this Court has culled out the principles to be kept in mind while granting or refusing bail. In that context, the two-Judge Bench has stated that: (SCC pp. 284-85, para 8)

> 8. … While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable grounds for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the

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4. AIR 1962 SC 253 : (1962) 1 Cri LJ 215 : (1962) 3 SCR 622
5. (1978) 1 SCC 118 : 1978 SCC (Cri) 41
6. (2005) 2 SCC 13 : 2005 SCC (Cri) 481
7. (2001) 4 SCC 280 : 2001 SCC (Cri) 674

> accused and that the prosecution will be able to produce *prima facie* evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

[17] In State of *U.P. v. Amarmani Tripathi*[8] while emphasising on the relevant factors which are to be taken into consideration, this Court has expressed thus: (SCC p. 31, para 18)

> 18. … While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.

In the said case, the Bench has also observed as follows: (*Amarmani Tripathi* case[8], SCC p. 32, para 21)

> 21. Therefore, the general rule that this Court will not ordinarily interfere in matters relating to bail, is subject to exceptions where there are special circumstances and when the basic requirements for grant of bail are completely ignored by the High Court.

[18] Recently, in *Ash Mohammad v. Shiv Raj Singh*[9] this Court while dealing with individual liberty and cry of the society for justice has opined as under: (SCC p. 454, para 18)

> 18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilised milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organised society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquillity and safety which every well-meaning person desires.

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8. (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)
9. (2012) 9 SCC 446 : (2012) 3 SCC (Cri) 1172 : JT (2012) 9 SC 155

[19] We are absolutely conscious that liberty is a greatly cherished value in the life of an individual, and no one would like to barter it for all the tea in China, but it is obligatory on the part of the court to scan and scrutinise, though briefly, as regards the *prima facie* case, the seriousness and gravity of the crime and the potentiality of the accused to tamper with the evidence apart from other aspects before the restriction on liberty is lifted on imposition of certain conditions.

[20] The submission of Mr Rohatgi is that there is total absence of material to connect the appellant with the crime in question but due to maladroit endeavour of the prosecution he has been falsely implicated. The learned Senior Counsel would emphatically urge that certain visits by a friend of Accused 1, a singular telephone call and filing of a public interest litigation where the appellant is not involved cannot form the foundation of a *prima facie* case relating to conspiracy.

[21] At this stage, it is useful to recapitulate the view this Court has expressed pertaining to criminal conspiracy. In *Damodar v. State of Rajasthan*[10], a two-Judge Bench after referring to the decision in *Kehar Singh v. State (Delhi Admn.)*[11] and *State of Maharashtra v. Som Nath Thapa*[12], has stated thus: (*Damodar* case[10], SCC p. 344, para 15)

> 15. … The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not (sic*) sufficient. A conspiracy is a continuing offence which continues to subsist

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10. (2004) 12 SCC 336 : 2004 SCC (Cri) Supp 265
11. (1988) 3 SCC 609 : 1988 SCC (Cri) 711
12. (1996) 4 SCC 659 : 1996 SCC (Cri) 820

* Ed.: In this regard see the last line of para 275 of *Kehar Singh v. State (Delhi Admn.)*, (1988) 3 SCC 609 : 1988 SCC (Cri) 711: "The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or a series of acts, he would be held guilty under Section 120-B of the Penal Code, 1860.

[22] In *Ram Narayan Popli v. CBI*[13] while dealing with the conspiracy the majority opinion laid down that: (SCC p. 778, para 342)

342. ... The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act.

It has been further opined that: (*Ram Narayan Popli* case[13], SCC p. 778, para 342)

342. ... The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. ... no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.

The two-Judge Bench proceeded to state that: (*Ram Narayan Popli* case[13], SCC p. 778, para 342)

342. ... For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit

13. (2003) 3 SCC 641 : 2003 SCC (Cri) 869

an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

[23] In the said case it has been highlighted that in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

[24] The present factual matrix is required to be tested on the aforesaid touchstone of law. There is no denial of the fact that the deceased was an RTI activist and extremely keen in exposing certain matters which pertain to illegal mining and many other such arenas. It is not in dispute that the deceased was murdered at about 8.30 p.m. on the public road just opposite the High Court and near the corner of Satyamev Complex-I where situates the office of the Bar Council of Gujarat. The appellant is a dealer in mobile phones and there is some material on record that he had handed over mobile phones to his friend who is a police constable and owns mines; and that a call has been traced from the mobile of the contract killer to the appellant. Mr Rohatgi would argue with vehemence that the aforesaid circumstances are sketchy and the prosecution has tried to rope the appellant in the conspiracy basically on the ground that he had provided the finance but the said story does collapse like a pack of cards inasmuch as Accused 1 had taken a substantial sum from his brother towards his share in the profit from the family property. It is also borne out on record that the appellant is an influential man in the society and he claims to be a friend of a constable and has urged that as a friend he was visiting his office and nothing has been stated to have been heard by the office peon. It is argued with immense emphasis that the sketchy connection does not make out a *prima facie* case against the appellant and further there is no material to infer that he would tamper with the evidence or would not make himself available for trial.

[25] Ordinarily, we would have proceeded to express our opinion on the basis of analysis of the material available on record but, a pregnant one, after order was reserved, Ms Arora, learned counsel appearing for Respondent 2 filed an order dated 25-9-2012 passed by the Division Bench of the High Court of Gujarat in *Bhikhalal Kalyanji Jethava v. State of Gujarat*[14]. On a perusal of the said order, it is luculent that the High Court after referring to its number of earlier orders and surveying the scenario in entirety has passed the following order:

> 13. As discussed in detail in paras 6, 7 and 9 herein, investigation into the murder of the petitioner's son does not appear to have been carried out in conformity with the legal provisions discussed in para 11 and the control exercised by one police officer of a very high rank, all throughout and even after the orders for further investigation by this Court, provides sufficient ground to conclude that the investigation was controlled and the line of investigation was determined and supervised so as to put to naught the allegations made and the suspicion raised by the acquaintances and family members of the deceased. As discussed in detail earlier in para 9, the investigation would hardly inspire confidence not only in the minds of the bereaved and aggrieved family members, but even the general public on taking an objective view of the matter. On the other hand, the deceased having been an active RTI activist, so many people whose vested interests may have been affected by his applications under the RTI Act, could have a motive to contribute into his killing. Therefore, a perfunctory investigation on the basis of statements of the accused persons themselves may not unearth the whole truth and meet the ends of justice. Therefore, it is imperative that proper and comprehensive investigation is undertaken by an agency which is not under the control of the State Government.
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> 14. The Right to Information Act, 2005 declared in its Preamble that, whereas the Constitution of India has established democratic republic and democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed; and to preserve the paramountcy of the democratic ideal, that it was enacted. The constitutional powers conferred upon the highest judicial institution in the State to entertain public interest litigation and issue necessary direction was also a step forward in enforcing the fundamental rights of the citizens and ensuring the rule of law.

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14. Special Criminal Application No. 1925 of 2010, order dated 25-9-2012 (Guj)

These progressive steps cannot be allowed to be nullified and no one should face a threat to his life when he approaches a court of law to exercise his right of access to justice. In such milieu, murder of a petitioner in a PIL and an RTI activist, in front of the High Court, could be read as a clear message to the citizens concerned that they may have to pay by their lives, if they insist upon using the tools placed in their hands by law and approach the court for redressal of public grievance against some individuals. The commission of murder, in the facts of the present case, amounted to an affront to the judicial system and a challenge to the implementation of an Act of Parliament, with national repercussions and has to be viewed seriously. Therefore, it is of utmost importance that the case on hand is thoroughly investigated and properly prosecuted by independent and competent officers, so as to inspire confidence and reaffirm the faith of the people in rule of law.

15. In the facts and for the reasons discussed hereinabove, while concluding that the investigation into the murder of the son of the petitioner was far from fair, independent, *bona fide* or prompt, this Court refrain from even remotely suggesting that the investigating agency should or should not have taken a particular line of investigation or apprehended any person, except in accordance with law. It is clarified that the observations made herein are only for the limited purpose of deciding whether further investigation was required to be handed over to CBI, and they shall not be construed as expression of an opinion on any particular aspect of the investigation carried out so far. However, in view of the peculiar facts and circumstances, following the *ratio* of several judgments of the Apex Court discussed hereinabove and in the interest of justice and to instil confidence in the investigation into a serious case having far-reaching implications that we order that further investigation into ICR No. 163 of 2010 shall be transferred to the Central Bureau of Investigation (CBI), with the direction that CBI shall immediately undertake an independent further investigation, and all the officers and authorities under the State Government shall cooperate in such investigation so as to facilitate submission of report of investigation by CBI as early as practicable and preferably within a period of six months. The police authorities of the State are directed to hand over the records of the present case to the CBI authorities within ten days and thereafter CBI shall take up comprehensive investigation in all matters related to the offence and report thereof shall be submitted to the court of competent jurisdiction and, in the meantime, further proceeding pursuant to the charge-sheets submitted by Respondent 5 shall remain stayed.

[26] On a perusal of the aforesaid order, it is demonstrable that the High Court has expressed its dissatisfaction with regard to the investigation conducted by the investigating agency. It has called it perfunctory. After ascribing reasons, it has directed CBI to expeditiously undertake further investigation. We may hasten to add that the legal propriety of the said order is not the subject-matter of challenge in the present appeal. It has only been brought to our notice that CBI has been directed to conduct a comprehensive investigation. Needless to state, it is open to the appellant to challenge the legal substantiality of the said order. But for the present, suffice it to say, as there is a direction for fresh investigation, it should be inapposite to enlarge the appellant on bail. We may add that in case the order for reinvestigation is annulled by this Court, it would be open for the appellant to file a fresh application for bail before the competent court. If the order of the High Court withstands scrutiny, after CBI submits its report, liberty is granted to the appellant to move the appropriate court for grant of bail. We may clarify that though we have narrated the facts, adverted to the parameters for grant of bail under Section 439 of the Code, dwelled upon the view of this Court relating to criminal conspiracy and noted the submissions of the learned counsel for the parties, we have not expressed our final opinion on the entitlement of the appellant to be released on bail or not because of the subsequent development i.e. direction by the High Court for comprehensive investigation by CBI.

[27] The appeal, is accordingly, disposed of.